

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 13, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP583

Cir. Ct. No. 2002CF886

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM J. LEE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
KENDALL M. KELLEY, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. William Lee, pro se, appeals an order denying his petition for a writ of habeas corpus in which he alleged ineffective assistance of appellate counsel pursuant to *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). We affirm the order because his petition was filed in the wrong forum,

Lee had other adequate remedies at law, and he failed to establish abandonment by his appellate attorney.

BACKGROUND

¶2 In 2009, Lee was convicted of armed robbery. The State Public Defender appointed Attorney Theresa Schmieder to represent Lee in postconviction proceedings.¹ Schmieder concluded there was no arguable basis for appeal and advised Lee of his options consistent with those set forth in *State ex rel. Flores v. State*, 183 Wis. 2d 587, 605-07, 516 N.W.2d 362 (1994): (1) to have the attorney file a no-merit report; (2) to have the attorney close the file without an appeal; or (3) to have the attorney close the file and to proceed pro se or with an attorney retained at the defendant's expense. Lee refused to choose among those options, insisting on having a copy of the transcripts from his case before making that decision. Schmieder apparently believed Lee chose the second or third option.

¶3 In April 2013, Lee filed petitions for a writ of habeas corpus in the circuit court, the court of appeals, and the Wisconsin Supreme Court. The court of appeals promptly struck the petition because it was not verified as required by WIS. STAT. § 782.04 (2013-14).²

¶4 In October 2013, Schmieder filed a motion to extend the time for filing a no-merit report, citing her difficulties receiving and reviewing fifty-three

¹ Lee questions whether the State Public Defender appointed Schmieder at the time she notified him of her appointment. We attach no significance to the timing of her appointment.

² All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

transcripts from Lee's case and her belief Lee chose to abandon his appeal. The motion also stated Schmieder filed motions to withdraw as counsel in the circuit court, and the circuit court would not rule on that motion until counsel filed a motion with this court to extend the time for filing a no-merit report. On October 7, 2013, this court granted the motion to extend the time for filing a no-merit notice of appeal and no-merit report.

¶5 On November 23, 2013, the Wisconsin Supreme Court dismissed the habeas corpus petition as moot, based on this court's order for extending the time for filing a no-merit notice of appeal.

¶6 On December 2, 2013, Schmieder filed a no-merit notice of appeal. Lee promptly filed a motion to discharge Schmieder, strike the no-merit notice of appeal, and grant permission for him to pursue an appeal or postconviction motion pro se. This court granted the motion. Lee then elected to voluntarily dismiss the appeal and pursue his issues in the circuit court by prosecuting the writ of habeas corpus filed in that court. On February 7, 2014, the circuit court denied Lee's habeas corpus petition because Lee failed to demonstrate he had no other adequate remedy at law. Lee appeals the circuit court's denial of the petition for a writ of habeas corpus.

DISCUSSION

¶7 Much of Lee's brief on appeal is devoted to challenging this court's order extending the time for filing a no-merit notice of appeal. He contends that decision was contrary to *State v. Evans*, 2004 WI 84, 273 Wis. 2d 192, 682 N.W.2d 784. In *Evans*, this court extended the time for filing a postconviction motion or notice of appeal, without giving the State an opportunity to oppose the motion. *Id.*, ¶13. The supreme court reversed that decision, concluding this court

could not circumvent the procedures set out in *Knigh*. *Id.*, ¶37, n.3. In Lee's case, no *Knigh* petition was pending in the court of appeals at the time the court granted the extension. The extension was not granted based on ineffective assistance of appellate counsel. Therefore, this court did not circumvent habeas corpus procedures by granting the motion. Furthermore, even if this court erred by granting the extension, the appropriate avenue for relief would have been for Lee to file a petition for review in the supreme court. To the extent Lee challenges the supreme court's denial of the writ of habeas corpus based on its conclusion that the issue was rendered moot by this court's extension order, this court has no authority to review the supreme court's decision.

¶8 The circuit court properly denied Lee's petition for several reasons. First, a claim that postconviction or appellate counsel abandoned a defendant must be presented to the court of appeals by a *Knigh* petition. See *State ex rel. Santana v. Endicott*, 2006 WI App 13, ¶4, 288 Wis. 2d 707, 709 N.W.2d 515. The relief available upon proving abandonment by counsel is reinstatement of direct appeal rights. *Id.*, ¶8. The circuit court lacks authority to reinstate direct appeal rights. *State ex rel. Kyles v. Pollard*, 2014 WI 38, ¶32, 354 Wis. 2d 626, 847 N.W.2d 805.

¶9 Lee cites cases in which the remedy for delay in bringing an appeal could be release from custody rather than reinstatement of appellate rights. Those cases require a showing of prejudice to the appeal before that remedy will be considered. See *Mathis v. Hood*, 937 F.2d 790, 794 (2d Cir. 1991); *Cody v. Henderson*, 936 F.2d 715, 719 (2d Cir. 1991). However, all of the ten issues Lee

identifies as potential appellate issues could have been raised despite the passage of time, and Lee makes no argument to the contrary.³

¶10 The circuit court also properly denied the petition because Lee had an adequate remedy at law. See *State ex rel. Haas v. McReynolds*, 2002 WI 43, ¶12, 252 Wis. 2d 133, 643 N.W.2d 771. That rule applies when relief may be had or could have been procured by resort to another general remedy. *State ex rel. Doxtater v. Murphy*, 248 WI 593, 603, 22 N.W. 685 (1948), *modified on other grounds by VanVoorhis v. State*, 26 Wis. 2d 217, 221 & n.2, 131 N.W.2d 833 (1965). Lee could have raised all of his ten issues by following through with the no-merit process and filing a response raising those issues, or by presenting them by postconviction motion in the circuit court and/or appeal after he discharged counsel, or by motion under WIS. STAT. § 974.06.

¶11 Finally, Lee's petition failed to establish ineffective assistance of appellate counsel. Schmieder correctly informed Lee of the three options available, and Lee's refusal to elect one of the options substantially contributed to the delay. Lee insisted on reviewing the transcripts from his case before making the decision of which option to pursue. His right to copies of the court record arises only after the decision is made to proceed pro se or upon request after a

³ The ten issues Lee identifies are: (1) a "one-man showup" contrary to *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582; (2) Lee's allegation that the State's main witness is a person who was mistaken or lied about previous contact with Lee because Lee could prove he was in prison and not in the Green Bay area; (3) a speedy trial violation; (4) the circuit court's lack of jurisdiction because the State failed to timely file the information; (5) ineffective assistance of trial counsel for failing to challenge the court's jurisdiction; (6) ineffective assistance of counsel for failing to request dismissal based on *Dubose*; (7) a denial of Lee's compulsory process; (8) a "total lack of evidence"; (9) the circuit court's "plain error" by allowing the trial to proceed when it never obtained jurisdiction; and (10) the circuit court's failure to suppress all of the identification evidence.

no-merit report is filed. *See* WIS. STAT. RULE 809.32(1)(d). Schmieder's delay in filing the notice of appeal did not constitute abandonment of her client.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

